Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 27, 1995

Honorable Brenda J. Heinold
Goliad County Attorney
P.O. Box 24
Goliad, Texas 77963

Letter Opinion No. 95-029

Re: Whether a county attorney may simultaneously serve as a member of the board of trustees of an independent school district in the same county (ID# 26341)

Dear Ms. Heinold:

You have requested an opinion from this office concerning an issue of dual office holding. You have us to understand that the Goliad Independent School District is the only school district which lies entirely within Goliad County. A member of the school district board of trustees was recently sworn in as county attorney for Goliad County and qualified as such by filing and having the requested bond approved shortly thereafter. Based upon these facts you ask that we consider the following:

(1.) Whether a member of a school district board of trustees may serve as county attorney for the county in which the school district lies; [and]

(2.) Whether the acceptance of the position of County Attorney acts as an *ipso facto* resignation from the office of school board trustee if a court finds the two offices to be incompatible.

We begin by considering article XVI, section 40 of the Texas Constitution, which provides in pertinent part:

> No person shall hold or exercise at the same time, more than one civil office of emolument . . . .

This prohibition applies whether the offices at issue are state, local, or federal. 2 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 731 (1977).

You assert that this particular instance of dual office holding does not appear to be in violation of the established constitutional prohibition. Because article XVI, section 40 applies only to civil offices "of emolument," it applies only to a person who receives a pecuniary profit, gain, or advantage from his or her office. *Irwin v. State*, 177 S.W.2d 970, 973 (Tex. Crim. App. 1944); Attorney General Opinion MW-450 (1982) at 1.

Pursuant to section 23.19(e) of the Education Code, a school board trustee serves without compensation or any other form of remuneration. Hence, because the position of school board trustee is not an office of emolument, we agree with your assertion that the situation about which you ask is not prohibited by article XVI, section 40 of the Texas Constitution.

We must now consider whether such offices are compatible pursuant to the common-law doctrine of incompatibility. This doctrine is premised upon the desire to protect the integrity of state and local governments by promoting impartial service by local officials. *See Ruiz v. State*, 540 S.W.2d 809, 812 (Tex. Civ. App.--Corpus Christi 1976, no writ); Attorney General Opinion JM-203 (1984) at 3; *see also Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152, 153 (Tex. Comm'n App. 1927, judgm't adopted). The common-law doctrine of incompatibility prohibits an individual from accepting two positions of public office if the officer will thereby be in a position to promote the interests of one constituency at the expense of another. In essence, the doctrine prohibits one office from improperly imposing its policies on the other or subjecting it to control in some way. *See* Attorney General Opinion JM-129 (1984) at 1; *see also Thomas*, 290 S.W. at 153.

An analysis of the doctrine of incompatibility requires that we consider three distinct aspects of the doctrine, "self appointment," "self employment," and "conflicting loyalties." The first, known as self appointment, addresses the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body. *See Ehlinger v. Clark*, 8 S.W.2d 666, 674 (Tex. 1928). In *Ehlinger*, the Texas Supreme Court stated:

> It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.

Id. at 674. Thus the doctrine has been held to prohibit an individual from holding two separate positions in which one is subordinate and accountable to the other. Attorney General Opinions JM-934 (1988) at 3, C-452 (1965) at 3; Attorney General Letter Advisory No. 114 (1975); *see also Turner v. Trinity Indep. Sch. Dist.*, 700 S.W.2d 1, 2 (Tex. App.--Houston [14th Dist.] 1983, no writ).

We note that the self appointment aspect of the doctrine is separate and distinct from the second aspect of the doctrine of incompatibility, known as self employment. In some instances, the doctrine of incompatibility has been applied in such a manner as to find an office and an employment incompatible. Such an analysis would be proper where the office had power to appoint or supervise the employee, or where the particular duties of the two positions and the relationship between them gave rise to a great risk that one

would impose its policies on the other. Attorney General Opinion JM-1047 (1989); Letter Opinion No. 89-82 (1989).

The third aspect of the doctrine of incompatibility, known as conflicting loyalties, suggests that offices are incompatible if their duties are or may be inconsistent or in conflict, but not if their duties are wholly unrelated, are in no manner inconsistent, and are never in conflict. 60 TEX. JUR. 3D *Public Officers and Employees* § 39, at 395 (1988). This aspect of the doctrine has been held only to apply to situations in which both positions at issue are offices rather than forms of employment. Attorney General Opinion JM-1266 (1990) at 4. *Thomas*, the seminal Texas case concerning incompatibility of office, involved the offices of city alderman and school trustee. 290 S.W. at 152. The court held that the offices were incompatible as a matter of law where the board of aldermen had directory or supervisory powers over school property and in respect to the duties of the school trustees. The court reasoned that if the same person could hold both offices contemporaneously, "school policies, in many important respects, would be subject to direction of the council or alderman instead of to that of the trustees." *Id.* at 153. Similarly, this office has held incompatible the offices of community college trustee and county commissioner and the offices of county auditor and city council member. Attorney General Opinions JM-129 (1984), JM-133 (1984); *see also* Letter Advisory No. 149 (1977).

In the situation about which you ask, we believe that a court of law would hold that the common-law doctrine of incompatibility would prevent an officeholder from simultaneously serving as a member of the school board of trustees while holding the office of county attorney based on conflicting loyalties. We conclude that the common-law doctrine of incompatibility, as a matter of law, prohibits a single individual from holding the office of county attorney and serving as a member of the board of trustees of an independent school district in the same county.

Article V, section 21 of the Texas Constitution establishes the office of the county attorney, who

> shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature. . . .

Tex. Const. art. V, § 21. Furthermore, various statutes require the county attorney to initiate action against school trustees under particular circumstances. For example, section 41.009 of the Government Code requires the county attorney to institute proceedings against an officer entrusted with public funds who is abusing this trust, including officers of school districts. *See Rawson v. Brownsboro Indep. Sch. Dist.*, 263 S.W.2d 578 (Tex. Civ. App.--Dallas 1953, writ ref'd n.r.e.); *Murray v. Harris*, 208 S.W.2d 626 (Tex. Civ.

App.--Waco 1948, no writ); *Hulett v. West Lamar Rural High Sch. Dist.*, 232 S.W.2d 669 (Tex. 1950). Similarly, the county attorney is authorized to investigate possible election fraud within his jurisdiction. Elec. Code § 273.001; *see also id.* §§ 273.002 - .024; Attorney General Opinion M-1180 (1972). Further, the county attorney has authority to bring removal actions involving school trustees. Tex. Const. art. V, § 24; Attorney General Opinion DM-114 (1992). A school district or its officers may also be subject to quo warranto proceedings initiated by the county attorney. *State v. Clarendon Indep. Sch. Dist.*, 298 S.W.2d 111 (Tex. 1957) (quo warranto by county attorney questioning consolidation of school district); *see* Civ. Prac. & Rem. Code ch. 66. Therefore we must conclude that because the county attorney is constitutionally and statutorily vested with the authority to investigate matters and institute proceedings regarding the possible criminal conduct of school district officers, he is thus precluded from participating or serving as both county attorney and a member of the school board of trustees.

In response to your second question, we believe that if a court were to concur in this result, the common-law doctrine of vacation would prevent the officeholder from returning to his or her former office. *See Thomas*, 290 S.W. at 153 (a person who accepts and qualifies for an office that is incompatible with an office the person already holds ipso facto relinquishes his or her prior post).

S U M M A R Y

A member of a school board of trustees may not serve as county attorney for the county in which the school district lies. The acceptance of the position of county attorney acts as an ipso facto resignation from the prior office.

Yours very truly,

Toya Cirica Cook

Toya Cirica Cook
Assistant Attorney General
Opinion Committee